

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE ESTATE OF JENNIFER
TIERNEY, et al.,
Plaintiffs

Case No. 1:08-cv-866
Weber, J.
Litkovitz, M.J.

vs

DAVID SHELLBERG,
Defendant

REPORT AND RECOMMENDATION¹

This civil action is before the Court on plaintiffs' motion for *nunc pro tunc* dismissal of plaintiff L.S. (Doc. 90), defendant's memorandum in opposition (Doc. 93), and plaintiffs' reply memorandum. (Doc. 94).

The face of the Amended Complaint indicates that plaintiff L.S. and defendant Shellberg are both Indiana citizens. While the other plaintiffs are Ohio residents, the presence of an Indiana plaintiff in this lawsuit deprives the Court of diversity jurisdiction. Thus, in the absence of complete diversity, the Court lacks subject matter jurisdiction. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). Accordingly, on October 18, 2010, the Court Ordered plaintiffs to show cause, in writing and within twenty (20) days, why the Amended Complaint should not be dismissed for lack of subject matter jurisdiction on the basis of diversity of citizenship. (*See* Doc. 87).

Plaintiffs did not timely respond to the Show Cause Order, and on November 17, 2010, the undersigned issued a Report and Recommendation that plaintiffs' complaint should be

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

dismissed for lack of subject matter jurisdiction on the basis of diversity of citizenship. (Doc. 88). Thereafter, on November 18, 2010, plaintiffs filed a motion for leave to respond out of time to the Court's Show Cause Order (Doc. 89), and a motion for *nunc pro tunc* dismissal of plaintiff L.S. (Doc. 90). Plaintiffs asserted that they did not receive email notification of the issuance of the Court's October 18, 2010 Show Cause Order and requested leave of Court to respond out of time. The Court granted plaintiffs' motion to respond out of time and vacated the November 17, 2010 Report & Recommendation that this matter be dismissed. (Doc. 91). Upon careful review, the undersigned finds that plaintiffs' motion to dismiss plaintiff L.S. is well-taken.

The Court may drop a nondiverse and dispensable party from litigation in order to achieve diversity. *See Safeco Ins. Co. v. City of White House, Tenn.*, 36 F.3d 540, 545 (6th Cir. 1994); *Reed v. Robilio*, 376 F.2d 392, 394 (6th Cir. 1967). "Rule 21 of the Federal Rules of Civil Procedure permits a district court to retain diversity jurisdiction over a case by dropping a nondiverse party if that party's presence in the action is not required under Federal Rule of Civil Procedure 19, that is, the party to be dropped must not be a necessary party." *Safeco*, 36 F.3d at 545. "[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Id.* (quoting *Newman-Green, Inc., v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989)).

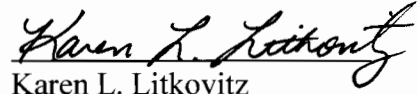
Here, L.S. is the minor daughter of the defendant David Shellburg and the decedent Jennifer Tierney. At the time of the filing of the complaint, plaintiffs William and Patricia Tierney, parents of the decedent, were involved in a custody proceeding in Indiana concerning L.S. Plaintiffs assert that L.S. was named as a plaintiff in anticipation of a favorable decision by the Indiana courts for the guardianship of her estate. (*See* Doc. 90, p. 2). However, plaintiffs did

not receive any guardianship authority relating to L.S from the Indiana court proceeding. Thus, plaintiffs assert that L.S. may be properly dismissed because she is not a necessary and/or indispensable party to this action, as any monetary award would be properly recovered by the Estate of Jennifer Tierney. The undersigned agrees, and finds that L.S is properly dismissed pursuant to Rule 21 of the Federal Rules of Civil Procedure.²

IT IS THEREFORE RECOMMENDED THAT:

Plaintiff's motion for *nunc pro tunc* dismissal of plaintiff L.S. (Doc. 90) should be **GRANTED**, and plaintiff L.S. be dismissed as a plaintiff in this action.

DATE: 1/5/2011


Karen L. Litkovitz
United States Magistrate Judge

² Notably, defendant Shellburg does not argue that L.S. is a necessary and/or indispensable party, and asserts that plaintiffs' motion should be denied as untimely. However, dismissal of L.S., at any time, is appropriate under the Federal Rules of Civil Procedure. *See Safeco*, 36 F.3d at 545.

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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

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1. Article Addressed to: David Shellberg 11369 Peagys Dr. Noblesville, TN 46060		B. Received by (Printed Name) C. Date of Delivery	
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1:08 cv 866 (Doc. 96)